



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 5, 1995

Ms. Margret C. Felty
Open Records Coordinator
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR95-1039

Dear Ms. Felty:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32203.

The Texas Department of Health (the "department") received two requests for documents relating to the Reclamation and Recovery, Inc. facility in Pecos, Texas, including files regarding the company's operations, industrial hygiene, inspection or investigation by the department or others.¹ You state that the department is releasing the bulk of the requested information but claim that a portion of the requested information is excepted from disclosure under section 161.0213 of the Health and Safety Code and the Texas Medical Practice Act as applied through section 552.101 of the Government Code, as well as the informer's privilege under section 552.101 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 161.0213 of the Health and Safety Code provides:

Reports, records, and information furnished to the commissioner or the commissioner's designee or the Texas Natural Resource Conservation Commission that relate to an epidemiologic or toxicologic investigation of human illness or conditions and of

¹You inform us that the requests are for the same information and from the same requestor. The only difference between the requests is the time period covered.

environmental exposures that are harmful or believed to be harmful to the public health are not public information under Chapter 552, Government Code, and are subject to the same confidentiality requirements as described by Section 81.046.²

In Open Records Decision No. 442 (1986), this office discussed similar language in the former version of section 81.046 of the Health and Safety Code. Former section 81.046 provided, in pertinent part:

Reports of diseases furnished to the health authority or the department are confidential and may be used only for the purpose of this Act. Reports of disease are not public information under [the Open Records Act].

In Open Records Decision No. 442 (1986), we concluded that the language "furnished to the health authority or the department" meant that the confidentiality provision of section 81.046 reached only reports given to health authorities or to the department. Therefore, investigative reports prepared by the department were not encompassed by section 81.046's grant of confidentiality. Open Records Decision No. 442 (1986) at 2. The statute was subsequently amended to specifically make "reports, records, and information relating to cases or suspected cases of diseases or health conditions" confidential subject to limited exceptions. Health & Safety Code § 81.046(b). This office concluded that the amendment to section 81.046 made any information acquired in the department's investigation confidential unless an exception set out in the statute applies. Open Records Decision No. 577 (1990).

Section 161.0213 specifically includes only "reports, records, and information *furnished* to the commissioner or the commissioner's designee." Therefore, we conclude that the plain meaning of the statute dictates that this section includes only that information which has been given to the department and not information generated within the department. We have marked the documents in Exhibit "A" that appear to contain information furnished to the department. The department may withhold this marked information.

The autopsy report contained in Exhibit "A" must be disclosed. It is expressly made public by the Code of Criminal Procedure. Code Crim. Proc. art. 49.25, § 11. The remaining documents contained in Exhibit "A" do not appear to be information furnished to the department but rather documents prepared by the department. Therefore, section 161.0213 does not except this information from disclosure.

²Reference to the "open records law . . ." was changed to "Chapter 552, Government Code" by the Seventy-fourth Legislature. Act of April 25, 1995, 74th Leg., R.S., ch. 76, § 5.95(88), 1995 Tex. Sess. Law Serv. 458, 552 (Vernon).

The Medical Practice Act (the "MPA"), article 4495b of V.T.C.S., protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The MPA is applied through section 552.101 of the Government Code. The documents submitted to this office in Exhibit "B" include laboratory reports. However, there is no indication that the documents were "created or maintained by a physician" or under the supervision of a physician. If these records were created or maintained by a physician or under the supervision of a physician, they are medical records falling within the scope of the MPA. Access to medical records is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. If these documents are medical records, they may only be released as provided by the MPA. There are records contained within Exhibit "B" that are clearly medical records. We have marked those documents for your information. They may only be released as provided by the MPA.

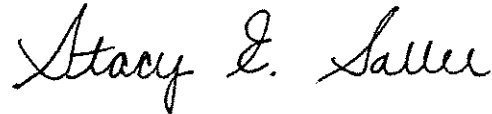
If the laboratory reports are not medical records because they were not created or maintained by a physician or under the supervision of a physician, we must address whether they are excepted from disclosure by privacy. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

We conclude that while there is a legitimate public interest in knowing how alleged environmental contamination is affecting persons living in the area, releasing information identifying these persons would violate these persons' common-law privacy rights. We have marked a sample of the documents submitted to this office for review to indicate the type of information that must be withheld. Unless the entire document is a medical record, the remainder of the information in these marked documents may not be withheld.³

³You contend that "the release of any of these records, specifically mercury levels, could lead to the identification of the individuals tested, and their lab results." We fail to see and you have not demonstrated how the release of de-identified lab results, specifically mercury levels in various individuals, could lead to their identification. For purposes of this argument, we are assuming that the laboratory reports are not medical records within the meaning of the MPA. As we have concluded that the identities of the persons tested must be withheld, we need not discuss the informer's privilege.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Stacy E. Sallee".

Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 32203

Enclosures: Marked documents

cc: Ms. Beverly A. Cherbonnier
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(w/o enclosures)